IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VULCAN GOLF, LLC, JOHN B. SANFILIPPO & SON, INC., BLITZ REALTY GROUP, INC., and VINCENT E. "BO" JACKSON, Individually and on Behalf of All Others Similarly Situated,	:	Case No. 07CV3371
	:	Judge Manning
Plaintiffs,	:	Magistrate Judge Brown
v.	:	
GOOGLE INC., OVERSEE.NET, SEDO LLC, DOTSTER, INC., AKA REVENUEDIRECT.COM, INTERNET REIT, INC. d/b/a IREIT, INC., and JOHN DOES I-X,	:	
Defendants.	:	

REPLY MEMORANDUM OF LAW IN SUPPORT
OF DEFENDANTS' CONSOLIDATED MOTION TO
DISMISS THE THIRD AMENDED COMPLAINT

Dated: May 30, 2008

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INTRODUCTION

Plaintiffs' Response Brief fails to explain away the deficiencies that continue to plague Plaintiffs' pleadings even after several rounds of briefing and multiple re-drafts of the complaint. Plaintiffs' RICO allegations remain a model of overzealous overreaching. The conclusory add-on allegations that Plaintiffs identify in their Response Brief as ostensibly meeting the RICO pleading requirements do nothing to transform Plaintiffs' trademark and cybersquatting claims against individual Defendants into a legally cognizable claim of an international RICO conspiracy. Plaintiffs' RICO claims (Counts I-III) and their non-trademark related state law claims based on the same underlying allegations (Counts XI-XIII) should be dismissed with prejudice.

ARGUMENT

I. PLAINTIFFS HAVE NOT SATISFACTORILY PLED THE ELEMENTS NECESSARY TO SUSTAIN THEIR RICO CLAIMS.

A. Plaintiffs' New Allegations Do Nothing To Bolster Their Claim Under § 1962(c).

1. Plaintiffs Still Provide No Basis for the Court To Find the Requisite RICO Enterprise.

In their Response Brief, Plaintiffs rely on their efforts to correct the admitted "insufficiencies" in the First Amended Complaint by adding "substantially more detailed factual allegations." Response Brief at 6. But the additional length of the allegations is merely cosmetic, for Plaintiffs have not altered the substantive structure of their RICO claims, which remain hopelessly flawed. Plaintiffs have changed the form in which they present their "enterprise" allegations: they have added logos, *see* TAC ¶ 83(K)(i) & (iii), a diagram, *see* TAC ¶ 253(d), several charts, *see* TAC ¶ 219 & 230, and pages upon pages of vague, boilerplate, sometimes redundant allegations. *See, e.g.*, TAC ¶ 225 ("The RICO Enterprise is an association-in-fact that has an existence that can be defined apart from commission of predicate acts constituting a 'pattern of racketeering activity,' and has an existence beyond that which is necessary to merely commit each of acts charged as predicate offenses."). But the substance is the same: Plaintiffs' "enterprise" consists of every website on the internet that displays Google ads— from the New York Times to MySpace to small Slovenian clarinet blogs,[1] and every

[1] *See, e.g.,* About Clarinet, http://hotclarinet.blogspot.com (last visited May 30, 2008).

company that helps place those ads on those sites. As before, and as explained in more detail below, Plaintiffs have failed to sufficiently identify the members of the enterprise, its structure, or its common purpose, and their RICO claims should once again be dismissed.

a. Plaintiffs Are Incorrect that Rule 8, Rather than Rule 9(b), Applies to Plaintiffs' Enterprise Allegations.

Plaintiffs cite an unpublished 1990 case from the Southern District of New York for the proposition that Federal Rule of Procedure 8, rather than the heightened pleading standard of Rule 9, applies to their RICO enterprise allegations. *See* Response Brief at 6 (citing *Kauffman v. Yoskowitz*, 1990 WL 300795, at *2 (S.D.N.Y. April 6, 1990)). That case, of course, was premised on the law in the Second Circuit, which applies the heightened pleading requirement only to the predicate acts of fraud. In *Hecht v. Commerce Clearing House, Inc.*, the case on which the Southern District of New York relied in *Kauffman*, the Second Circuit held that a RICO conspiracy claim need not be pled with particularity. *Hecht*, 897 F.2d 21, 26 n.4 (2d Cir. 1990).

The law in the Seventh Circuit is directly to the contrary. As recently as last year, the Seventh Circuit confirmed that "Rule 9(b) applies to 'averments of fraud,' not claims of fraud." *Borsellino v. Goldman Sachs Group, Inc.*, 477 F.3d 502, 507 (7th Cir. 2007). Thus, "[a] claim that 'sounds in fraud'—in other words, one that is premised upon a course of fraudulent conduct—can implicate Rule 9(b)'s heightened pleading requirements" even if the claim itself is not strictly one for fraud. *Id.* at 507 (applying Rule 9(b) to claims of interference with economic advantage, interference with fiduciary relationship and civil conspiracy); *see also Lachmund v. ADM Investor Servs., Inc.*, 191 F.3d 777, 783 (7th Cir. 1999) (applying 9(b) to allegations of agency and noting "when the plaintiff relies upon the same circumstances to establish both the alleged fraud and the agency relationship of a defendant, the reasons for more particularized pleading that animate Rule 9(b) apply with equal force to the issue of agency and to the underlying fraud claim").

Thus, in the Seventh Circuit, "*Borsellino* requires that parties plead their RICO conspiracy claims with particularity." *Gas Tech. Inst. v. Rehmat*, 524 F. Supp. 2d 1058, 1074 (N.D. Ill. 2007). All constituent RICO allegations necessarily must adhere to the same standard. Here, as in *Borsellino*, Plaintiffs' entire theory of the case, not to mention the theory behind their RICO claims, is premised on allegations that Defendants engaged in a scheme designed to deceive and defraud. Plaintiffs' contention that Rule 9(b) applies only to some of the allegations in support of their RICO claim (*i.e.*, the predicate act allegations) but not to others (*i.e.,* the enterprise allegations) is inconsistent with *Borsellino* and Seventh Circuit precedent. *See, e.g., Borsellino*, 477 F.3d at 507; *Lachmund*, 191 F.3d at 783; *Veal v. First Am. Sav. Bank*, 914 F.2d 909, 913 (7th Cir. 1990) (affirming dismissal of claims under Rule 9(b) for violations of the Indiana Deceptive Practices Act, breach of fiduciary duty, and negligence where plaintiffs "primarily seek relief based upon allegedly fraudulent activity"); *Stephenson v. Hartford Life & Annuity Ins. Co.,* 2003 U.S. Dist. LEXIS 17036, at *15 (N.D. III. Sept. 26, 2003) ("Claims traditionally not perceived to be grounded in fraud nonetheless must be pleaded with particularity when the complaint incorporates by reference prior allegations of fraud.") (internal quotation marks omitted).

Rule 9(b) applies to all of Plaintiffs' RICO allegations, including their allegations of enterprise. For the reasons described below and in Defendants' Opening Brief, Plaintiffs failed to meet that standard, and their RICO claims should be dismissed.

b. Plaintiffs' Expanded 40 Paragraphs Devoted to Alleging a RICO Enterprise Are Insufficient to Sustain an Enterprise Allegation.

In its March 20, 2008 Order, this Court stated that if other entities participating in Google's Adsense and Adwords Networks are properly included as members of the enterprise, "the purported enterprise becomes even less-defined, with no limits or restrictions . . . '[s]uch a nebulous, open-ended description of the enterprise does not sufficiently identify the essential element [i.e., enterprise] of the RICO offense.'" *Vulcan Golf, LLC v. Google Inc.*, 2008 U.S. Dist. LEXIS 22155, at *82 (N.D. Ill. Mar. 20, 2008) (Manning, J.) (quoting *Richmond v. Nationwide Cassel*, 52 F.3d 640, 645 (7th Cir. 1995)). Plaintiffs suggest that because they now have devoted forty paragraphs in the TAC to enterprise allegations, "including several charts and graphics," the Court should give them credit for "seriously consider[ing] the deficiencies identified by this Court in its March 20, 2008 Order" and find that Plaintiffs' redoubled pleading efforts get them beyond a motion to dismiss. Response Brief at 7. Adding more verbiage and new graphics, however, cannot conceal the absence of enterprise allegations that pass muster under Rule 8 or Rule 9.

Plaintiffs' definition of "enterprise"—which still consists of Google and every individual and entity with whom Google does advertising business, directly or indirectly, in the entire world—is characterized by the same absurdly large size and nebulousness of alleged enterprises that are consistently rejected by the Seventh Circuit. The contention that Google may outline the terms of its advertising contracts and may be able to collect the records necessary to identify each of the millions of participants in its advertising network does not render any less absurd Plaintiffs' contention that the entire group of millions of advertising partners is a nefarious, structured RICO enterprise. Thus, Plaintiffs have not sufficiently addressed the fact that their alleged enterprise lacks necessary limits and restrictions as this Court noted in its March 20, 2008 Order.

An analogous example is the enterprise alleged in *Richmond v. Nationwide Cassel*, 52 F.3d 640 (7th Cir. 1995). That enterprise allegedly consisted of "Nationwide Group," which plaintiffs defined as consisting of a specific auto company, specific insurance companies, and maybe others, "and the car dealers with which it maintains relationships and from which it purchases retail installment contracts." *Id.* at 644 n.9. The complaint did not list every single car dealer and insurance company with whom the Nationwide Group did business, but presumably discovery would have revealed such information. Nevertheless, the Court rejected the notion that such a "nebulous" "string of entities" constituted a RICO enterprise. *Id.* at 645-46; *see also Stachon v United Consumers Club, Inc.*, 229 F.3d 673 (7th Cir. 2000) (rejecting for the same reason allegations that an enterprise consisted of "[the United Consumers Club], its franchisees, its officers and/or directors, its members, participating wholesalers, and participating manufacturers"). Here, Plaintiffs likewise allege an amorphous string of unrelated entities—but here the string consists of *millions* of unidentified participants. For the same reasons the Seventh Circuit rejected the enterprise allegations in *Richmond* and *Stachon*, Plaintiffs' claims here fail as well.

c. Plaintiffs Still Do Not Sufficiently Allege the Structure of the Enterprise Apart from the Conduct of Its Members.

As Defendants explained in detail in their Opening Brief, Plaintiffs' allegations fall short of alleging the structure required by *Jennings v. Emry*, 910 F.2d 1434 (7th Cir. 1990), and *Stachon*, among other cases, because Plaintiffs have defined the structure of the enterprise only by describing the allegedly wrongful conduct of its members. Plaintiffs' sole response to this argument is to point to three paragraphs in the TAC that they claim establish "a structure separate and distinct from the Deceptive Domain Scheme and the predicate acts associated therewith." Response Brief at 9.

Two of these paragraphs simply regurgitate boilerplate caselaw language and do nothing to advance Plaintiffs' case. *See* TAC ¶ 225 (reciting "an existence that can be defined apart from commission of predicate acts"); TAC ¶ 245 (reciting "an ascertainable structure separate and apart from the pattern of racketeering activity"). But as the Supreme Court instructed in *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007), "a formulaic recitation of the elements of a cause of action will not do." The third paragraph, Paragraph 241, is irrelevant to structure. In that paragraph, Plaintiffs allege that "not every operation and action of the RICO enterprise is illegal, for example, AdWords advertisements are frequently placed/displayed/associated with legitimate domains/sites/video/search results."[2] Extraneous allegations of *legitimate* conduct do not mitigate the TAC's failure to in any way describe and distinguish the alleged enterprise apart from the purported *illegitimate* conduct of its members. Whether legitimate or illegitimate, the TAC's basis for the structure of the enterprise wholly rests on allegations pertaining to the conduct of its members. As in *Jennings*, "there is nothing indicating an enterprise existing apart from the [Defendants'] deeds," and as a result, Plaintiffs have not pled an enterprise. *Jennings*, 910 F.2d at 1440 n.14.

d. Plaintiffs Do Not Plead Anything Other than Ordinary Business Relationships.

The fact that Plaintiffs have added detailed allegations about Defendants' ordinary business relationships does not salvage their failed attempt at pleading structure. In its March 20, 2008 Order, this Court stated that the FAC failed "to allege any 'organizational structure,' or any type of 'hierarchical or consensual decision-making.'" *Vulcan Golf, LLC*, 2008 U.S. Dist. LEXIS 22155 at *83. The Court stated that the FAC was deficient because it merely set out "how each of the defendants conducts its own business operations" but that "'liability depends on a showing that the defendants conducted or participated in the conduct of the enterprise's affairs, not just their own affairs.'" *Id.* at *85 (quoting *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993)). Plaintiffs' allegations still do not support a finding that the required structure existed outside of Defendants' normal business relationships because Plaintiffs' allegations merely illustrate a series of independent contracts between countless unrelated entities, each of whom happens to have a contractual relationship with Google.

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[2] Such allegations may be the result of an incorrect assumption that Plaintiffs must establish that a RICO enterprise must have a *purpose* separate and apart from the alleged pattern of racketeering activity. That is not the law in this Circuit. *See United States v. Rogers*, 89 F.3d 1326, 1336-37 (7th Cir. 1996) (providing that Plaintiffs' obligation is to plead that the enterprise is separate and apart from the pattern of racketeering activity, not that the enterprise has an economic purpose apart from the predicate acts).

Plaintiffs, of course, still try to deny that the only things they have alleged are ordinary business relationships. Relying on a district court case from Florida, Plaintiffs assert that there is no requirement that a RICO enterprise be narrow, and suggest that if a court can allow an alleged enterprise of a national health care network of doctors, health plans, labs, and hospitals to get beyond a motion to dismiss, the enterprise alleged here should suffice as well. Response Brief at 12 (citing *In re Managed Care Litig.*, 185 F. Supp. 2d 1310, 1323 (S.D. Fla. 2002)). As Plaintiffs concede, however, the Eleventh Circuit does not subscribe to the same heightened structure requirement applicable in the Seventh Circuit, and thus, the *Managed Care* court's hypothetical suggestions as to what it might do were the Seventh Circuit's standard to apply amount to nothing more than dicta. *See In re Ins. Brokerage Antitrust Litig.*, 2007 U.S. Dist. LEXIS 73220, at *125 (D.N.J. Sept. 28, 2007) (rejecting application of *Managed Care* to analyze plaintiffs' enterprise pleadings because the Third Circuit abides by the strict structure requirement).

In any event, the court in *In re Managed Care* relied heavily on the "*network*" of contacts between and among the members of the alleged healthcare enterprise, which has a structural model completely different than the enterprise Plaintiffs allege here. *Managed Care*, 185 F. Supp. 2d at 1323–1324 (emphasis in original). The alleged managed care enterprise involved a web of interactive and cross-connected participants: insurers who regularly and repeatedly interact with doctors, labs, and hospitals; doctors who regularly and repeatedly interact with hospitals, labs, and insurers, and so on. By contrast, the enterprise alleged here is not an interactive network structure, but, at most, is a series of independent contracts between countless unrelated individuals and entities, each of whom happens to have a contractual relationship with Google.[3]

For yet another case rejecting pleadings analogous to Plaintiffs' here, see *In re Lupron Mktg. & Sales Practices Litig.,* 295 F. Supp. 2d 148, 173–174 (D. Mass 2003):

[3] Further and contrary to Plaintiffs' suggestion, Google's use of the word "network" to describe its programs is not an admission of enterprise status for RICO purposes any more than it would be when used by CBS or Sprint.

> [T]here are no allegations (and it is difficult to see how there could be) that the thousands of doctors who benefitted from discounted purchases or free samples of Lupron® were associated together in any meaningful sense, or were even aware of one another's existence as participants in a scheme to defraud. Without the elements of organization and control, whether informal or formal, and the existence of association, whether legal or factual, any group of persons sharing a common occupation, e.g., urologists and lawyers, and a similar motive, e.g., greed, could be held to constitute a RICO enterprise.

Id. at 173–74 (internal citations omitted). As in *Lupron*, the Plaintiffs here make no allegation that the various alleged participants in the enterprise are aware of each other's existence, let alone are working together to effect a worldwide fraud. Plaintiffs cite no case for the proposition that such an unrelated series of contractual relationships is sufficient to establish an enterprise. Their RICO claims fail.

e. Defendants' Allegedly Similar Individual Goals Do Not Suffice To Establish a "Common Purpose."

In an attempt to plead the necessary element that Defendants are "joined in a common purpose," Plaintiffs substitute the concept of similar but individually-held goals among Defendants for the concept of a truly common purpose. To successfully plead a RICO enterprise, one must allege the latter. Plaintiffs here, despite their repetitive use of the phrase "common purpose," merely allege the former.

With their own allegations, Plaintiffs concede that Sedo, IREIT, Oversee, and Dotster are competitors who have individual, unrelated contracts with Google. While Plaintiffs allege in a conclusory fashion that Defendants are "joined in the common purpose of obtaining maximum economic and commercial gain," TAC ¶ 222, nowhere in the TAC do Plaintiffs allege that Defendants shared a common, *interdependent* profit motive as opposed to each having the *independent* goal of profiting for its individual benefit (as opposed to for the benefit of the enterprise). The absence of such an allegation does not merely create an issue of material fact, as Plaintiffs contend in their Response Brief, but constitutes a pleading deficiency that is fatal to Plaintiffs' claim under *Stachon* and other authority. *See* Defendants' Opening Brief at 9-11; s*ee also First Nationwide Bank v. Gelt Funding Corp.*, 820 F. Supp. 89, 98 (S.D.N.Y. 1993) (refusing to find an enterprise where plaintiffs alleged that each borrower-defendant committed a similar but independent fraud with the aid of a particular lender, and that each such defendant acted to benefit himself and not to assist any other defendant); *New York Auto. Ins. Plan v. All*

Purpose Agency & Brokerage, Inc., 1998 U.S. Dist. LEXIS 15645 at *15-16 (S.D.N.Y. Oct. 6, 1998) (same).

f. A Conclusory Allegation of "Derivative" Control Is Not Sufficient To Meet Enterprise Pleading Requirements.

Plaintiffs concede that their 1962(c) claim will fail unless they successfully plead that Defendants participate in the direction of the enterprise. *See* Response Brief at 14. Although Plaintiffs recite as a mantra their allegation as to how Google controls a vast nefarious network (of its own customers and contract partners), Plaintiffs make only one specific allegation as to how the other Defendants supposedly control (as opposed to merely participate in) the enterprise. Specifically, Plaintiffs suggest that Oversee, Sedo, IREIT, and Dotster "derivatively" control the enterprise because they can license with third parties who then participate in Google's advertising programs through each respective Defendant. Response Brief at 14 (quoting TAC ¶ 234). But any such license amounts to nothing more than a freely negotiated contractual arrangement, and it is settled law that "[a]n arms-length business relationship between distinct entities is not sufficient to show operation or management of an enterprise." *Crichton v. Golden Rule Ins. Co.*, 2006 U.S. Dist. LEXIS 56235, at *22 (N.D. Ill. Aug. 11, 2006). Such a contractual relationship does not constitute the requisite "control over the enterprise itself." *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 598 (7th Cir. 2001). Plaintiffs make no viable allegations that anyone other than Google controls the alleged enterprise.

2. Plaintiffs Have Not Refuted the Fact That Their Allegations Regarding RICO Predicate Acts Are Insufficient as a Matter of Law.

Plaintiffs' Response Brief relies on the TAC's repeated recitation of the boilerplate elements for each predicate act, accented with conclusory words like "fraud," "scheme," and "deceptive," as opposed to citing specific factual allegations supporting each of their theories. Such an approach to pleading, however, does not even get Plaintiffs past Rule 12(b)(6)—let alone Rule 9(b). *See, e.g., R.E. Davis Chem. Corp. v. NALCO Chem. Co.*, 757 F. Supp. 1499, 1516 (N.D. Ill. 1990) ("[A] plaintiff who relies upon acts of mail and wire fraud as the basis for a RICO claim must do more than outline a scheme and make loose references to mailings and telephone calls.").

In a complaint against multiple defendants, a plaintiff must specify which particular defendants were involved in which specific activities and communications, and may not merely lump groups of defendants together. *Sears v. Likens*, 912 F.2d 889, 893 (7th Cir.

1990). Even Plaintiffs concede that for claims of mail and wire fraud, a plaintiff must describe the time, place, content of, and parties to the mail and wire communications. Response Brief at 15 (quoting *Jepson, Inc. v. Makita Corp.*, 34 F.3d 1321, 1328 (7th Cir. 1994)). Despite its length, the TAC does not allege *one* specific communication transmitted by wire or mail that identifies: 1) the person communicating; 2) the recipient of the communication; 3) when it was sent; 4) when it was received; and 5) its content. Plaintiffs therefore fall far short of their Rule 9(b) obligation to "specify which defendants said what to whom and when." *Ackerman v. Northwestern Mut. Life Ins. Co.*, 172 F.3d. 467, 471 (7th Cir. 1999); *see also Petri v. Gatlin*, 997 F.Supp. 956, 983-84 (N.D. Ill. 1997) (denying RICO claims premised on pleading insufficiency due to failure to allege dates and substance of mailings).

In a futile effort to salvage their pleading, Plaintiffs provide a chart in their Response Brief that purports to set forth the fraudulent actions alleged in the TAC with the correlative allegations as to the method and manner in which each act allegedly was carried out. The chart, however, serves only to highlight the deficiencies in the TAC. Plaintiffs simply repeat a mantra as to each of the sixteen allegedly fraudulent acts, that the "Method/Manner" was "Wire—electronically, on the Internet with automated software." Response Brief at 19. They do not say which Defendant did what to whom and when—not for even *one* single allegedly fraudulent act—because such allegations simply do not exist in the TAC.

Perhaps recognizing that their RICO claims are doomed under Rule 9(b), Plaintiffs suggest that they are not subject to heightened pleading requirements. In the preceding round of briefing on Plaintiffs' RICO claims, Plaintiffs relied on *Jepson* and *Midwest Grinding Co., Inc. v. Spitz*, 976 F.2d 1016, 1020 (7th Cir. 1992) in support of their plea for a relaxed pleading standard. Now realizing that in each of those cases the Seventh Circuit actually rejected the proposition that the particular RICO plaintiffs in those cases should be excused from specificity requirements, Plaintiffs have hung their hats on a few First Circuit cases and *Corley v. Rosewood Care Ctr.*, 142 F.3d 1041, 1051 (7th Cir. 1998), contending that specificity requirements should be relaxed because certain factual details are within Defendants' exclusive knowledge. *See* Response Brief at 16. Plaintiffs ignore, however, that a plaintiff seeking to circumvent specificity requirements has the affirmative burden to prove that the requisite information was solely within the defendants' control. This burden is not satisfied by a conclusory statement. *Ackerman*, 172 F.3d at 471 (noting that the plaintiffs did not, and could not, show that the information was within the exclusive control of the defendants). Rule 9(b) is a purposefully stringent standard that "requires the plaintiff to conduct a pre-Complaint investigation in sufficient depth to assure that the charge of fraud is responsible and supported, rather than defamatory and extortionate." *Id.* at 469. Plaintiffs also ignore that even in those unusual circumstances in which courts relax 9(b) standards, a plaintiff must, at a minimum, identify the time and place of the alleged predicate acts. *Midwest Grinding*, 976 F.2d at 1020.

Plaintiffs have not met their burden of explaining why the information that they need is within Defendants' exclusive control. To the contrary, Plaintiffs suggest that the information they lack is readily ascertainable on freely viewable internet web-pages that are "obvious and easy to identify." TAC ¶ 167. Nor have Plaintiffs made any specific allegations of time and place as to *any* of the predicate acts. In *Corley*, by contrast, the plaintiff made both showings. The plaintiff in *Corley* alleged in his complaint that he did not have the information necessary to make specific pleadings with respect to details of certain allegedly fraudulent communications because his pre-complaint request for such information had been denied. Moreover, Corley did make very specific allegations with respect to other communications as to which he was able to collect information. In light of those efforts, the Seventh Circuit agreed with the district court that Corley had met the pleading requirements. *Corley*, 142 F.3d at 1050-51. Plaintiffs here make no such allegations.

In any event, Plaintiffs' allegations not only are insufficiently particularized to withstand scrutiny under Rule 9(b), but for the reasons explained in Defendants' Opening Brief, they also fail to make out a case for mail or wire fraud. Also, the predicate acts that Plaintiffs purport to plead pursuant to 18 U.S.C. §§ 1952, 1957 and 2320 merely reincorporate their mail and wire fraud allegations. Thus, Plaintiffs' add-on predicate act claims are afflicted by the same fatal pleading deficiencies as Plaintiffs' independent mail and wire fraud claims, and they, too, fail.

To the extent Plaintiffs make an independent argument as to the viability of their claim under 18 U.S.C. § 1952, that argument also is without merit. Although, a plaintiff also may bring an action under 18 U.S.C. § 1952 for illegal activity indictable under 18 U.S.C. § 1956 or § 1957, Plaintiffs' conclusory allegation that the alleged conduct of Defendants here is indictable is wholly insufficient. *See Buckley Dement, Inc. v. Perez*, 1990 U.S. Dist. LEXIS 11102, at *15 (N.D. Ill. Aug. 23, 1990) ("Accordingly, where plaintiff cannot set forth a prior conviction as proof of a predicate act, the plaintiff's complaint must satisfy stringent pleading requirements. An act is not considered 'indictable' merely because it is alleged.").

3. As Plaintiffs' Injuries Are Derivative, Their RICO Claims Should Be Dismissed.

Plaintiffs take great pains to argue that their alleged injury is direct rather than derivative, but the injuries they describe flow from conduct underlying a trademark infringement or unfair competition claim; they do not flow directly from the alleged mail and wire fraud underlying their RICO claims. Even if Plaintiffs' allegations were true, their alleged injuries are derivative of the supposed confusion among customers created by the alleged domain name infringements. There is no direct injury from the alleged mail fraud.

This is best demonstrated by focusing on the claimed injuries to Plaintiffs' interests. Unless *consumers* are actually confused and misdirected from Plaintiffs' websites, *Plaintiffs* have suffered no injury compensable by a damage award. *See e.g. Libman Co. v. Vining Indus., Inc.*, 69 F.3d, 1360, 1363 (7th Cir. 1995) (proof of actual confusion of the consuming public is required in a trademark infringement case when damages are sought). Similarly, if there is no actual consumer deception arising from the alleged infringement, there can be no diminution of goodwill. Trademark cases universally recognize that the injury to a plaintiff's interests is a consequence of, or derivative of, the injuries suffered by consumers who have been confused or deceived by the infringement:

> A plaintiff wishing to recover damages for a violation of the Lanham Act must prove the defendant's Lanham Act violation, that the violation caused actual confusion among consumers of the plaintiff's product, and, *as a result*, that the plaintiff suffered actual injury, i.e., a loss of sales, profits or present value (goodwill).

Web Printing Controls Co., Inc. v. Oxy-Dry Corp., 906 F.2d 1202, 1204–05 (7th Cir. 1990) (emphasis added); *see also Zelinski v. Columbia 300, Inc.*, 335 F.3d 633, 639 (7th Cir. 2003) ("To recover damages, [plaintiff] must show that the violation caused actual confusion among his customers and, *as a result,* he suffered actual injury.") (emphasis added); *see also* TAC ¶¶ 301, 391, 406 ("Defendants' activities have irreparably harmed, and if not enjoined, will continue to irreparably harm, the general public.").

In short, all of Plaintiffs' injuries arise only from the harm allegedly inflicted on the consuming public by virtue of Defendants' alleged trademark infringement and cybersquatting. This conduct, even if proven, cannot serve as the basis of a RICO claim. "Firms suffering derivative injury from business torts . . . must continue to rely on the common law and the Lanham Act rather than resorting to RICO." *Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1259 (7th Cir. 1995).

The Seventh Circuit's decision in *Phoenix Bond & Indem. Co. v. Bridge,* 477 F.3d 928 (7th Cir. 2007), *cert. granted*, 128 S.Ct. 829 (2008), is not to the contrary. *Phoenix Bond* applies only "if [the plaintiff's] injury is not derivative of someone else's." *Id.* at 932. In *Phoenix Bond*, Cook County, which had developed a bidding program for the sale of tax liens, suffered no injury at all (and in fact benefited) from the allegedly fraudulent scheme, and competing bidders like the plaintiff were the only allegedly injured parties. *Id.* at 931. Under those unusual circumstances, the plaintiff's alleged injuries were deemed not to be "derivative" of someone else's injuries. But *Phoenix Bond* did not overturn *Israel Travel*—indeed, both opinions were authored by Judge Easterbrook. And the court expressly approved of the statements in *Israel Travel* that "business rivals may not use RICO to complain about injuries derivatively caused by mail frauds perpetrated against customers" and "firms suffering derivative injury from business torts . . . must continue to rely on the common law rather than resorting to RICO." *Id*. at 933. This case is more akin to *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 405-06 (9th Cir. 1991) with which the *Israel Travel* court expressly agreed, 61 F.3d at 1258, distinguishing between anticompetitive conduct and "fraud" within the meaning of RICO. Because Plaintiffs' claimed injuries are derivative of those sustained by consumers who allegedly have been deceived, their RICO claims fail.

B. Plaintiffs Have Not Pled a Claim Under § 1962(a).

1. Plaintiffs Have Failed to Allege Reinvestment of Income.

Plaintiffs remain unable to differentiate between allegations concerning income derived from allegedly illegal conduct and the reinvestment of income into the purported enterprise. The distinction is critical for purposes of succeeding with a claim under 18 U.S.C. § 1962(a). The receipt of income from a pattern of racketeering activity is not sufficient to state a claim under § 1962(a). Rather, according to the words of the statute itself, the defendant must "use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

In their Response Brief, Plaintiffs cite only one allegation in the TAC asserting that Defendants invest the income from the alleged RICO violation back into the enterprise, and that allegation does nothing more than parrot the language of § 1962(a). *See* Response at 28 (citing TAC ¶ 338). "Plaintiffs do not allege any details of Defendants' investment of the income, how the income was invested to injure Plaintiffs or how Plaintiffs' alleged injury is distinguishable from the predicate racketeering act or reinvestment of the income into a business activity." *Vega v. Contract Clearing Maint., Inc.*, 2004 U.S. Dist. LEXIS 20949, at *42 (N.D. Ill. Oct. 18, 2004). Accordingly, the § 1962(a) claim should be dismissed.

2. This Court Should Not Reject the Tide of Cases Following the Investment Injury Rule.

Another flaw in Plaintiffs' § 1962(a) claim is that it is premised on the tenuous assumption that this Court should reject the investment injury rule, notwithstanding that the Seventh Circuit "expressed accord" with the majority of Courts of Appeal that have adopted the rule, and notwithstanding that since the Seventh Circuit did so, "each court in this district addressing the issue has adopted the majority use or investment rule." *Shapo v. O'Shaughnessy*, 246 F. Supp. 2d 935, 965 (N.D. Ill. 2002); *see also Cobbs v. Sheahan*, 385 F. Supp. 2d 731, 736 (N.D. Ill. 2005) (citing *Vicom v. Harbridge Merch. Servs., Inc.*, 20 F.3d 771, 779 n.6 (7th Cir. 1994)).

Recognizing that they have failed to "allege that [their] injury was caused by [d]efendants' use or investment of income derived from racketeering activity" as required by the investment injury rule, *Starfish Inv. Corp. v. Hansen*, 370 F. Supp. 2d 759, 779 (N.D. Ill. 2005) (quoting *Vega*, 2004 U.S. Dist. LEXIS 20949, at *12), Plaintiffs focus their energies on asking this Court to ignore the investment injury rule. In doing so, they cite to a string of Seventh Circuit cases that, without exception, predate *Vicom*. *See* Response Brief at 29. Plaintiffs are forced into this untenable position because while the TAC contains a multitude of vague allusions to receipt and distribution of funds received, it includes only a solitary conclusory allegation of reinvestment. However, § 1962(a) is designed to prevent not the receipt of income from racketeering, but the reinvestment of such income. *See Matrix IV, Inc. v. Am. Nat'l Bank & Trust Co.,* 2007 U.S. Dist. LEXIS 18567, at *23 (N.D. Ill. Mar. 15, 2007) (quoting *Lugosch v. Congel*, 443 F. Supp. 2d 254, 270 (N.D.N.Y. 2006)) ("The basic purpose of § 1962(a) is to prevent racketeers from using their ill-gotten gains to operate, or purchase a controlling interest in, legitimate businesses."). As Plaintiffs are unable to present any compelling justification, this

Court should decline their “invitation to depart from the tide of cases from this district applying the majority investment rule.” *Starfish Inv. Corp.,* 370 F. Supp. 2d at 779.

3. Plaintiffs Have Alleged Injury Only as a Result of the Predicate Acts.

Unable to escape the deficiencies of their own pleadings or provide a single citation to a post-*Vicom* case in this circuit rejecting the investment injury rule, Plaintiffs instead halfheartedly postulate on alternate theories of proximate cause. Plaintiffs assert that their § 1962(a) claim should survive because, aside from racketeering activity, “there may be other activity that is also a proximate cause of the same injury.” Response Brief at 29. Plaintiffs make this argument despite the fact that their own pleadings allege injuries only as a result of the predicate acts. *See* TAC ¶ 339 (alleging injury under § 1962(a) as a result of the “predicate acts which make up the Defendants’ patterns of racketeering activity through the Enterprise.”); *see also* Response at 29 (incorrectly asserting Plaintiffs “have adequately pled injuries as a result of the predicate acts alleged in the TAC”).

Even had Plaintiffs alleged the alternate proximate cause about which they now argue, the fact that they also plead injury as a result of the predicate acts is fatal to their claim. *See Cobbs*, 385 F. Supp. 2d at 736 (holding that even where plaintiff suggested “a distinct investment injury,” additional attribution of the injury to the underlying predicate acts “submarines her § 1962(a) claim”). As such, Plaintiffs’ claim under § 1962(a) cannot be cured and should be dismissed.

C. The RICO Conspiracy Claims Fail Because Plaintiffs Do Not Satisfy the Elements of § 1962(d).

Without adequately pleading a RICO enterprise, Plaintiffs simply cannot establish a RICO conspiracy. *EQ Fin., Inc. v. Pers. Fin. Co.*, 421 F. Supp. 2d 1138, 1149 (N.D. Ill. 2006). Because Plaintiffs’ RICO conspiracy claims rely on the same underlying enterprise allegations which form the basis for their unsuccessful claims under § 1962(a) & (c), Count III of the TAC should also be dismissed. *See Stachon*, 229 F.3d at 677.

Even if Plaintiffs had successfully alleged an enterprise and predicate acts, Plaintiffs’ conspiracy claim still would fail because, as discussed *supra*, Plaintiffs’ conspiracy allegations are subject to Rule 9(b), a standard that they have not met here. *Gas Tech. Inst.*, 524 F. Supp. 2d at 1074. At best, Plaintiffs allege that each Parking Company Defendant entered into a contract with Google, and that "[e]ach Defendant has acted in concert, and is independently profiting and deriving commercial gain from the illegal conduct alleged [in the TAC].” TAC

¶ 79. Absent specific averments that Defendants agreed to violate the substantive provisions of RICO (and allegations regarding the details of such an agreement), Plaintiffs' conspiracy claim fails.

II. PLAINTIFFS' CLAIM FOR INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE LACKS REQUISITE ALLEGATIONS OF KNOWLEDGE.

As noted in Defendants' Opening Brief, Plaintiffs' claim for interference with prospective economic advantage fails to the extent Plaintiffs have not alleged that each Parking Company Defendant had knowledge of each Plaintiff's respective business expectancies. *See* Opening Brief at 31. Plaintiffs' only response to this deficiency is to contend that general class-wide allegations of knowledge are sufficient to meet their pleading burden, and to argue that "even if Defendants don't individually operate a particular domain/site it does not necessarily mean they are unaware of a particular domain/site." Response Brief at 32. Yet claiming that a Defendant might not "necessarily" be "unaware" of an expected business relationship hardly suffices to meet the knowledge requirement. Because Plaintiffs do not allege specific knowledge, the claim should be dismissed.

III. THE COURT SHOULD DISMISS PLAINTIFFS' UNJUST ENRICHMENT AND CIVIL CONSPIRACY CLAIMS BECAUSE PLAINTIFFS HAVE NOT MET THE HEIGHTENED PLEADING STANDARDS OF RULE 9(B).

Under Illinois law, "where the plaintiff's claim of unjust enrichment is predicated on the same allegations of fraudulent conduct that support an independent *claim* of fraud, resolution of the fraud claim against the plaintiff is dispositive of the unjust enrichment claim as well." *Ass'n Benefit Servs., Inc. v. Caremark Rx, Inc.*, 493 F.3d 841, 855 (7th Cir. 2007). Because Plaintiffs have failed to plead fraud with the specificity required by Rule 9(b), the civil conspiracy and unjust enrichment counts, both premised on the same fraudulent conduct, should be dismissed as well. Plaintiffs' suggestion that the Court should choose not to apply Rule 9(b) is unavailing; to plead their unjust enrichment and conspiracy claims Plaintiffs simply incorporate by reference the other allegations of the TAC that describe Defendants' allegedly fraudulent scheme. Having incorporated such allegations of fraud into their claims for unjust enrichment and conspiracy, Plaintiffs cannot seek to escape the strictures of Rule 9(b). Their claims do not meet the heightened pleading standard, and they should be dismissed.

CONCLUSION

For the reasons stated above and in Defendants' initial Memorandum of Law in Support of their Consolidated Motion to Dismiss the TAC, Defendants respectfully request that the Court grant their motion and dismiss with prejudice Counts I, II, III, XI, XII, and XIII of the TAC.

Dated: May 30, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on May 30, 2008, a true and correct copy of the foregoing **REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' CONSOLIDATED MOTION TO DISMISS THE THIRD AMENDED COMPLAINT** was electronically filed with the Clerk of the Court for the Northern District of Illinois using the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

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